UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-60117-CR-ALTONAGA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ERIC RAYMOND ROPER,

Defendant.
_____/

ORDER

THIS CAUSE came before the Court for an evidentiary hearing on August 6, 2019 (*see* [ECF No. 34]) on Defendant, Eric Roper's Motion to Suppress Testimonial Evidence [ECF No. 21], filed July 12, 2019. Defendant seeks to suppress statements he made on April 30, 2019 and May 1, 2019, on the basis they were obtained in violation of his rights against self-incrimination, to remain silent, and to an attorney. (*See id.* 1). On August 5, 2019, the Government filed its Response in Opposition to the Defendant's Motion to Suppress [ECF No. 33]; and on August 30, 2019, Defendant filed his Reply [ECF No. 40]. For the reasons explained below, the Motion is granted in part and denied in part.

I. BACKGROUND

On April 30, 2019, Defendant, Eric Raymond Roper, was arrested after a controlled delivery at Defendant's home of approximately 1,038 MDMA or Ecstasy pills shipped from the Netherlands with the Defendant listed as the recipient. Homeland Security Investigations ("HSI") Supervisory Special Agent Marco Suarez spoke to the Defendant almost immediately after his arrest, while the Defendant sat on the ground, handcuffed and with his back against the wall.

Suarez directed HSI Special Agents Nicole Nualart and Jacques Philippe to talk to the Defendant to see if the Defendant wished to cooperate and further the investigation.

Agents Nualart and Philippe talked to the Defendant outside the home, near a lake by his apartment, and Suarez joined them all about a minute or two later. SSA Suarez reassured Defendant he was in good hands and the agents would take care of him if he cooperated. SSA Suarez then returned to the apartment, leaving the Defendant with Agents Nualart and Philippe.

SA Nualart testified that she and Philippe informed Defendant they were federal agents, he was going to be charged with possession with intent to distribute ecstasy, they knew he was on probation, he was facing 10 to 15 years in prison, and it was "probably in his best interest to cooperate." SA Nualart also told Defendant "he would get credit" if he cooperated. Without having read Defendant his *Miranda* rights, SA Nualart asked the Defendant whether he wanted a lawyer, and he responded, "Yes." SA Nualart testified she and Philippe were "kind of bewildered" that Defendant "need[ed] to talk to somebody."

SA Nualart took the Defendant back inside the apartment and informed her boss, SSA Suarez, that Defendant had invoked his *Miranda* rights by "ask[ing] for an attorney." SSA Suarez understood this to mean the Defendant had invoked his *Miranda* rights, and therefore Suarez instructed his agents not to approach the Defendant.

About five to ten minutes later, Defendant, while seated and handcuffed in the living room, asked HSI Agent Clancy Dunnigan to tell SSA Suarez he wanted to speak to Suarez. SSA Suarez then took the Defendant to the master bedroom to allow him to change his clothes. Once changed, Defendant went with SSA Suarez into the guestroom, and there asked Suarez to explain what cooperation entailed. SSA Suarez answered, explaining he wanted the Defendant to help in the arrest of the other person or persons involved. SSA Suarez interpreted Defendant's question about

cooperation to mean he was rescinding his previous invocation of *Miranda*. SSA Suarez also told Defendant because Defendant had "already invoked," Defendant would "need to waive his rights" for SSA Suarez to be able to speak with him further. SSA Suarez also said even if he waived his *Miranda* rights, Defendant "still retains rights."

Once the conversation in the guestroom was over, SSA Suarez believed Defendant had rescinded his previous invocation. Notably, up to this point, no one had read Defendant his *Miranda* rights. SSA Suarez then instructed Agent Nualart that Defendant "wanted to waive his *Miranda* rights" and she should attempt to interrogate him once more. So, Agents Nualart and Philippe took the Defendant to a small patio behind the apartment. There, SA Nualart turned on a recording device and began, for the first time, to read Defendant his *Miranda* rights. After she read him his rights – including the right to remain silent, anything he said could be used against him in a court of law, and the right to an attorney – she asked him whether he understood his rights, and he responded affirmatively.

SA Nualart then asked Defendant if he agreed to talk to them, and he asked her to pause the recorder. She did so. While the recorder was turned off, Defendant asked SA Nualart to explain once more what cooperation entailed. She explained cooperation and asked the Defendant if his wife "was aware of the contents of the packages," to which Defendant replied, "No." She then asked Defendant if "he was aware there was ecstasy inside the packages," to which he responded, "Yes," clarifying it was not for personal use, but for distribution. SA Nualart told Defendant if he delivered the packages and other arrests were made, "he would get credit for them which would take time off his sentence."

When this brief conversation ended, SA Nualart turned the recorder back on and attempted to have the Defendant sign the *Miranda* form. She asked Defendant "Do you agree to talk to us?"

and he said "Yes, ma'am. I am going to agree." SA Nualart then told Defendant he had to initial after every sentence on the *Miranda* form, print his name, and sign it. Defendant initialed after each right but when he reached the "Waiver" portion of the *Miranda* form, he refused to sign it. No additional conversation ensued. Defendant was transported to the Broward County jail late that night. While waiting for transport, Defendant stated to his wife "[t]hese guys are being super cool with me and are helping me out."

The following day, on May 1, 2019 at 8:00 a.m., Agents Nualart and Victor Garcia drove to the county jail and took Defendant out of his cell. Defendant was placed inside the agents' unmarked federal law enforcement vehicle, where SA Nualart began interviewing him again. Despite the Defendant having refused to sign the *Miranda* rights waiver form the night before and the interrogation having abruptly ended, SA Nualart proceeded to interview the Defendant because she interpreted his refusal to sign the form as indicating he did not want to cooperate with the packages and deliver them; "he never said that he wanted a lawyer" the way he had while at the lake earlier in the day.

SA Nualart turned on the recording device and began by stating, "Last night you were read your *Miranda* rights and you agreed to speak with us without an attorney present. Do you remember the *Miranda* rights you were read?" Defendant replied in the affirmative, and SA Nualart then asked, "Do you still agree to speak with us?" Defendant replied, "Yes ma'am, pertaining towards, towards my wife." SA Nualart and Garcia then proceeded to ask Defendant questions designed to elicit incriminating information that were not limited to Defendant's wife.

Defendant's answers incriminated him. Near the end of the interrogation, SA Garcia stated, "I mean, come on man, this is not your first rodeo; you know what I'm saying?" Defendant

responded, "This is not my first rodeo and that's why I said I know I needed an attorney, you know." After this statement, the HSI agents ceased questioning.

Although not addressed at the August 6 Hearing, the Pretrial Services Report prepared for the Defendant shows: Defendant is 32 years old; he was born in the United States and completed high school in Ft. Lauderdale; he worked full-time as manager of a carwash service for a year before the arrest in this case; he had recently established a business called Gorilla Detail; he is married and has three minor children; at the time of these events he was on probation following a four-year state prison sentence for drug-trafficking; he has several prior arrests, including charges that were dismissed, for which adjudication was withheld, and for which he was adjudicated guilty; there is no evidence to suggest he has a current or past mental health condition; and the last time he smoked marijuana was the day before his arrest.

II. ANALYSIS

Defendant argues once a suspect invokes his *Miranda* rights, police officers are prohibited from engaging in words or actions the officers "should know are reasonably likely to elicit an incriminating response from the suspect." (Mot. 7 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)). Defendant asserts Agents Nualart and Garcia violated Defendant's Fifth Amendment rights when they continued interrogating him after he invoked his right to remain silent and to an attorney. (*See id.* 9).

The Government insists no "constitutional transgression of the Defendant's rights occurred" because: (1) Defendant's initial request for counsel was freely and voluntarily withdrawn prior to discussing cooperation, as mentioned to the Defendant by SSA Suarez and the case agent before Defendant's invocation; (2) the right to counsel was requested once and withdrawn by the Defendant, who never again requested counsel until the end of the May 1

interview; and (3) no violation was committed during the May 1 recorded statement because the Defendant made no invocation of his right to remain silent and request to terminate questioning. (Resp. 1).

Following the evidentiary hearing, Defendant submitted his Reply, stating: (1) he did not withdraw his previously invoked *Miranda* rights; (2) his Sixth Amendment right to counsel[1] was violated before he made incriminating statements; (3) because he never waived his *Miranda* rights, he was not required to repeatedly invoke them when the HSI agents reinitiated the interrogation on May 1, 2019. (*See* Reply 11–18). The Court considers these points below.

A. Applicable Law

Under *Miranda v. Arizona*, prior to the initiation of questioning, a suspect in custody must be informed in clear and unequivocal terms he has the right to an attorney, to remain silent, and anything said can and will be used against him in court. *See* 384 U.S. 436, 468–69 (1966). Law enforcement "must fully apprise the suspect of the [Government's] intention to use his statements to secure a conviction . . . .'" *Moran v. Burbine*, 475 U.S. 412, 420 (1986) (alteration added).

"Beyond this duty to inform, *Miranda* requires that the police respect the accused's decision to exercise the rights outlined in the warnings." *Moran*, 475 U.S. at 420. Once a suspect has informed police he wishes to consult with an attorney, interrogation of the suspect must cease "until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477,

[1] The issues raised are properly considered under the Fifth Amendment, given at the time Defendant made incriminating statements, his Sixth Amendment right to counsel had not yet attached. *See Rothgery v. Gillespie Cty., Tex.*, 554 U.S. 191, 213 (2008) (reaffirming "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel."). In any event, the "standard for finding a waiver is the same under the fifth and sixth amendments." *United States v. Scarpa*, 897 F.2d 63, 68 (2d Cir. 1990) (citing *Patterson v. Illinois*, 487 U.S. 285, 292–93 (1988)).

484–85 (1981). But because merely initiating conversation with the police does not necessarily constitute a waiver of the right to counsel, courts employ a two-part test to determine whether a suspect who has properly invoked his *Miranda* right to counsel has subsequently waived that right. *See Oregon v. Bradshaw*, 462 U.S. 1039, 1045–46 (1983). Waiver of the right to counsel, once invoked, can only be established on a showing the accused 1) initiated further dialogue with law enforcement; and 2) the accused voluntarily, knowingly, and intelligently waived the right to counsel. *See id.*

A defendant initiates conversation by asking questions or making statements that show "a willingness and a desire for a generalized discussion about the investigation[.]" *Id.* (alteration added). The inquiry of whether a waiver is valid also includes "two distinct dimensions":

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

Moran, 475 U.S. at 421; *see also Everett v. Sec'y, Fla. Dep't. of Corr.*, 779 F.3d 1212, 1242 (11th Cir. 2015) (quoting *Smith v. Illinois*, 469 U.S. 91, 95 (1984)).

To determine whether a waiver meets these requirements, courts examine the decision "'under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities.'" *Bradshaw*, 462 U.S. at 1046 (quoting *Edwards*, 451 U.S. at 486 n.9). Factors to consider include the background, experience, and conduct of the suspect, *see id.* (citations omitted); as well as his age, educational level, and level of intelligence; the length of the detention, and the nature of the questioning, *see United States v. Alameda*, No. 07-20584-CR, 2007 WL 2819520, at *5 (S.D. Fla. Sept. 25, 2007) (citation omitted). "Only if the totality of the circumstances surrounding the interrogation reveal both an uncoerced

choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Moran*, 475 U.S. at 421 (internal quotation marks and citations omitted). Ultimately, the government bears the burden of demonstrating a defendant's knowing and intelligent waiver by a preponderance of the evidence. *See Colorado v. Connelly*, 479 U.S. 157, 168 (1986).

It is undisputed Defendant asked for an attorney shortly after being apprehended when he told HSI Agents Suarez, Nualart and Phillippe he wished to speak to one. The question the Court is asked to answer is whether Defendant waived this right prior to making incriminating statements. Having set forth the relevant legal framework, the Court now applies it to each of the interrogations separately.

B. April 30, 2019 Interrogation

Shortly after invoking his right to counsel, Defendant initiated a conversation with the HSI agents by first asking if he could speak to SSA Suarez, and then asking Suarez to explain what cooperation entailed. The Government argues Defendant waived the earlier invocation of his right to counsel during this conversation. Yet, a basic tenet of *Miranda* is that "[n]o effective waiver of the right to counsel during interrogation can be recognized unless specifically made *after* the warnings . . . have been given." 384 U.S. at 470 (alterations and emphasis added). Defendant had not yet been read his *Miranda* rights at this point and therefore could not effectuate a valid waiver.

The point after which Defendant could first validly waive his rights was during the interview with Agent Nualart. Agent Nualart turned on the recording device and — for the first time — read Defendant his *Miranda* rights. After reading Defendant his *Miranda* rights, Agent Nualart asked Defendant if he understood his rights, and he responded affirmatively. There is no indication Defendant lacked a clear understanding of his rights. When SA Nualart asked

Defendant if he agreed to speak to the agents, Defendant asked her to pause the recording. Defendant asked SA Nualart for further clarification on cooperation while they were, as he apparently perceived, "off the record." Defendant incriminated himself during this unrecorded conversation, and after the recorder was turned back on, initialed each right on the written form but did not sign the Waiver portion of the form.

"[I]n at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." *North Carolina v. Butler*, 441 U.S. 369, 373 (1979) (footnote call number omitted); *see also Berghuis v. Thompkins*, 560 U.S. 370, 384 (2010) (noting waivers can be established even absent formal or express statements and an "implicit waiver" may be sufficient to admit a suspect's statement into evidence). Waiver may be implied "if after being advised of his rights an individual responds willingly to questions without requesting an attorney." *United States v. Boon San Chong*, 829 F.2d 1572, 1574 (11th Cir. 1987) (citation omitted). And "[a]n accused's decision to answer some questions, but not others, further supports a finding of an implied waiver — the accused's selective responses suggest an understanding of the right to respond." *Id.* (alteration added; citation omitted).

"[M]erely answering questions after *Miranda* warnings have been given does not necessarily constitute a waiver . . . ." *Scarpa*, 897 F.2d at 68 (alterations added) (citing *Butler*, 441 U.S. at 373). In other words, standing alone, the fact a *Miranda* warning was given and the accused made an uncoerced statement is insufficient to demonstrate a valid waiver of *Miranda* rights. *See Berghuis*, 560 U.S. at 384. "The prosecution must make the additional showing that the accused understood these rights." *Id.* (citations omitted). The Government here has made that showing.

Although Agent Nualart had not read Defendant the "Waiver" portion of the *Miranda* rights form when the off-the-record conversation took place, Defendant had been read and had indicated his understanding of all his rights. Not once did he pause Agent Nualart in the recitation of his rights to ask for clarification. At the conclusion of her reading, Defendant was asked "Do you understand your rights?" and he answered "Yes, ma'am." In requesting the agent turn off the recorder and in answering Agent Nualart's questions, after he had been fully apprised of his *Miranda* rights, Defendant through his conduct and answers validly waived the rights of which he had just been informed. *See, e.g.*, *United States v. Booker*, No. 1:11-CR-255-1-TWT, 2013 WL 2903552, at *6, n.23 (N.D. Ga. June 13, 2013) ("Although [the detective] did not also read the 'waiver' paragraph aloud, reciting the 'rights' portion of the *Miranda* form to [the defendant] clearly served the warnings purpose of 'ensur[ing] an accused is advised of and understands his right to remain silent and the right to counsel.'" (first two alterations added; quoting *Berghuis*, 560 U.S. at 383)).

The factors surrounding the investigation suggest Defendant did have the "requisite level of comprehension," *Moran*, 475 U.S. at 425, to impliedly waive his rights. Defendant acknowledged this was not his "first rodeo" — as is evident from the criminal history reflected in the Pretrial Services Report — and that is why he had first indicated wanting an attorney.

Defendant's course of conduct indicates a knowing waiver. Defendant was adequately and effectively apprised of his rights, *see Butler*, 441 U.S. at 374, acknowledged he understood them, including the right "anything you say can be used against you in a court of law," "the right to remain silent," and "the right to consult an attorney before . . . answering any questions;" yet he proceeded to make incriminating statements, did not remain silent, and went headlong into a conversation with Agent Nualart without first consulting the attorney he had earlier expressed

wanting. At no time did the agents engage in any coercive conduct. Given the totality of the circumstances, Defendant's decision to respond to Agent Nualart's questions was made "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran*, 475 U.S. at 421.

The Court also considers the brief exchange of words that followed once SA Nualart turned the recording back on, as it bears on the interrogation that took place the following morning. During this interaction, Defendant stated he was "going to agree" to speak and initialed each sentence of the *Miranda* form that he had previously acknowledged understanding, but ultimately refused to sign it. SA Nualart testified "when it came down to printing his name, signing and dating, he wavered. He stalled for quite some time and he never signed it." Defendant did not say anything further after that and remained silent. The agents terminated the interrogation, thus signaling their understanding Defendant had rescinded his earlier waiver of his *Miranda* rights.

It is "well-settled law that a refusal to sign a waiver form is not equivalent to an invocation of rights which would render subsequent questioning improper." *Booker*, 2013 WL 2903552, at *5 (internal quotation marks and citations omitted). While the refusal to sign a rights-waiver form is not always conclusive of the question of waiver, *see, e.g.*, *Boon San Chong*, 829 F.2d at 1574, under the circumstances, Defendant's refusal to sign is an indication Defendant no longer wished to waive his rights. While there are "multiple, differing interpretations" as to why an accused may refuse to sign a waiver form, "rendering the act ambiguous," *United States v. Isaac*, 448 F. App'x 954, 957 (11th Cir. 2011) (citation omitted), here, Defendant's actions, combined with the ensuing silence, convey a revocation of his earlier waiver. Unlike the defendant in *United States v. Caldwell*, a case on which the Government relies, Defendant never suggested "despite his refusal to sign the form he still wanted to talk." No. CIV. A. 94-310-01, 1995 WL 461224 (E.D. Penn.

Aug. 2, 1995). Defendant's refusal to complete the waiver form instead points to his reluctance to give up rights he had previously waived.

Given the circumstances of this case, the Court finds Defendant voluntarily, knowingly, and intelligently waived his *Miranda* rights during the April 30, 2019 non-recorded interview, but thereafter retracted the waiver and so the questioning ceased.

C. May 1, 2019 Interrogation

Despite the Defendant having refused to sign the *Miranda* rights waiver form the night before, the next morning the HSI agents once again interviewed Defendant. This interview was improper.

The Court agrees with Defendant the HSI agents "should not have re-engaged Mr. Roper on the morning of May 1, 2019." (Reply 17). The *Edwards* rule is clear: once the accused has invoked his right to counsel and absent a valid waiver, he should not be "subject to further interrogation by the authorities until counsel has been made available to him, unless [he] himself initiates further communication, exchanges, or conversations with the police." *Edwards*, 451 U.S. at 484–85 (alteration added).

> *Edwards* set forth a "bright-line rule" that *all* questioning must cease after an accused requests counsel . . . In the absence of such a bright-line prohibition, the authorities through "badger[ing]" or "overreaching" — explicit or subtle, deliberate or unintentional — might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance.

Smith v. Illinois, 469 U.S. 91, 98 (1984) (internal citations omitted; alterations added).

Nothing in the record shows Defendant re-initiated conversation with the agents on May 1, 2019 after invoking his *Miranda* rights the previous day. That the HSI agents somehow believed Defendant had waived his rights after even they ceased questioning upon Defendant's refusal to sign the written-rights waiver form is immaterial. SA Nualart's stated interpretation Defendant's

refusal to sign the form merely indicated he did not want to cooperate with the controlled deliveries – stated in response to the undersigned's question at the evidentiary hearing – is contradicted by her own actions the day before in turning off the recorder and terminating the interrogation.

Be that as it may, on the present record it is clear to the undersigned the way the April 30 interview concluded abruptly should have, at a minimum, made the HSI agents question whether Defendant had revoked his earlier waiver and wanted to speak to police at all. Certainly, the Defendant did not re-initiate further communication, exchanges, or conversations with police. The Government has carried its burden of showing Defendant mad an "uncoerced choice" and had the "requisite level of comprehension" when he qualifiedly agreed to speak to the agents on May 1 about his wife. *United States v. Barbour*, 70 F.3d 580, 585 (11th Cir. 1995) (quoting *Moran*, 475 U.S. at 421).

Accordingly, because Defendant withdrew his earlier waiver at the conclusion of his interaction with law enforcement on April 30, 2019 and because he did not initiate conversation with HSI on May 1, 2019 as required by *Edwards*, statements made during the May 1, 2019 interview must be suppressed.

III. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that Defendant, Eric Roper's Motion to Suppress Testimonial Evidence **[ECF No. 21]** is **GRANTED** in part and **DENIED** in part.

DONE AND ORDERED in Miami, Florida, this 19th day of September, 2019.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record